MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

DHANOA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. 24(31)-F2490-85]
28 MARCH 1990

CIVIL PROCEDURE: *Setting aside - Judgment entered - Mistake - Court cannot set it aside - Exceptions - Fresh action must be commenced.*

On 9 February 1989, the plaintiff P applied to Court for an order that 6 pieces of land (the said lands) which were charged to P, be sold by public auction and a fresh date to be fixed and also for an order that fresh reserve prices of the said lands to be fixed. The earlier auction sale on 18 December 1987 was abortive as there were no bidders. At the hearing date, a consent order of P's application was granted and reserved prices were fixed at the same prices as the earlier order.

P's solicitors sent the draft order to the defendant's solicitor but there was no response; as a result of which P's solicitor sent the draft order to the Senior Assistant Registrar (SAR) for approval pursuant to O. 42 r. 8 by Rules of the High Court 1980. The draft order was approved perfected and served on D's solicitors.

D's solicitor, A, seeks for an order by summons-in-chambers that part of the order made on 14 August 1989 fixing the reserved prices of the 6 lots of land to be by public auction be set aside. A said that he thought that

(i) the matter would be adjourned that the SAR would fix the reserve prices,

(ii) that the reserve prices would not be fixed on the same date and

(iii) no valuation reports were submitted although 2 years had expired. In short, A said that M, who consented on his behalf to the fixing of the reserve price, had done it under a mistake.

Held:
Based on the case law, the Court has no jurisdiction to vary the order made on 14 August 1989 as it is a final order. The Court can only take cognisance of a fresh action commenced by the defendant to set aside that part of the order of the Court directing the reserve prices to be fixed for the sale of the lands in question.

[D's application dismissed.]

Cases referred to:
Ainsworth v. Wilding [1896] 1 Ch 673
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143

Legislation referred to:
National Land Code 1965, s. 257(1)(d)
Rules of the High Court 1980, O. 42 r. 8
Rules of the Supreme Court 1957, O. 28 r. 11
Rules of the Supreme Court 1883 [UK], O. xxviii, r. 11

For the plaintiff - Ruby Khoo Beng Suan; M/s. Shook Lin & Bok
For the defendant - Kanesalingam; M/s. Kanesalingam & Co.

JUDGMENT

Lim Beng Choon J:

This was an application by the defendant made by way of summons-in-chambers for an order that part of the order of this Court made on 14 August 1989 fixing the reserved prices of six lots of land to be sold by public auction be set aside (encl. 32).

A brief account of the events leading to the defendant making the present application is necessary in order that one can appreciate the reason as to why the defendant chose to make the present application.

On 9 February 1989 the plaintiff applied to this Court for an order that the lands held under HS(D) Nos. 580, 583, 585, 587 and 588 for Lot Nos. 2661, 2664, 2665, 2666, 2668 and 2669 respectively in Mukim Ulu Klang charged to the plaintiff be sold by public auction under the National Land Code and under the directions of the Court on a fresh date to be fixed and also for an order that fresh reserve prices of the said lands be fixed. The plaintiff had to make that application because although this Court had on 8 October 1987 made an order directing the lands to be sold by public auction to be held on 18 December 1987, the auction sale held on that date was abortive as there were no bidders. The reserved prices for the sale of the said lands were then fixed as follows:

Lots No.	Reserve Price
i. 2661	RM 325,000
ii. 2664	RM 280,000
iii. 2665	RM 280,000
iv. 2666	RM 330,000
v. 2668	RM 269,000
vi. 2669	RM 274,000
	RM 1,758,000

On 14 August 1989 when the plaintiff's application came on for hearing, Miss Ruby Khoo appeared as Counsel for the plaintiff while Miss Jana Manjaji appeared as Counsel for the defendant. By consent I granted order in terms of the plaintiff's application. Again by consent I fixed the reserved prices of the auction of the six lots of land in the same amounts as mentioned in the earlier order of this Court dated 8 October 1987. When the plaintiff's solicitors sent the draft order of this Court to the defendant's solicitors the latter failed to respond and the plaintiff's solicitors thereupon sent the draft order to the Senior Assistant Registrar of this Court (SAR) for approval pursuant to O. 42 r. 8 of the Rules of High Court 1980. The SAR duly approved the draft over and apparently it was duly drawn up and perfected and served on the solicitors for the defendant who thereupon caused the present application to be made.

In his affidavit in support (encl. 31) of this application Mr. A. Kanesalingam, the solicitor of the defendant averred that when he requested Miss Manjaji, a pupil reading in chambers, to attend on his behalf before me to obtain consent order in terms of the plaintiff's application he had the following assumptions in mind:

(i) that the Judge would adjourn the fixing of the reserve prices to be made by the SAR as was usually done,

(ii) that although a date for auction would be fixed by the Judge the reserve prices would not be fixed on the same date,

(iii) that no valuation reports were submitted although two years had expired.

Consequently, so said he, when he was informed by Miss Manjaji that the Judge had proceeded to fix the reserve prices on 14 August 1989 he was taken by surprise. He, however, admitted that Miss Manjaji was under the impression that his request to her not to oppose the plaintiff's summons included instructions not to oppose an application to fix the reserve prices based on valuation made in 1987. As such Miss Manjaji consented to the fixing of the reserve prices under a mistake. He went on to say that as there had been an improvement in the economy and the prices of land and house had appreciated since June 1987 the reserve prices should be related to the present better market value of the lands in question pursuant to s. 257(i)(d) of the National Land Code.

In dealing with the defendant's application I need only to cite two authorities. The first is *Ainsworth v. Wilding* [1896] 1 Ch 673. The headnote in that case says:

> After judgment has been passed and entered - even where it has been taken by consent and under a mistake - the Court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1.) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court 1883, O. xxviii., r. 11, or (2) the judgment as drawn up does not correctly state what the Court actually decided and intended to decide - in either of which cases the application may be made by motion in the action.
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> Semble, that different considerations apply to interlocutory orders; but that even if a judgment has not been passed and entered the Court will not always interfere on motion, e.g., where from the nature of the ground relied on conflicting evidence is essential.

The second authority is *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 where Chang Min Tat FJ said at p. 144:

> Clearly the Court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the Court: *Re St. Nazaire Co., Kelsey v. Doune, Hession v. Jones*, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co. and Jonesco v. Beard.*

Transposing the principles laid down in the aforesaid two authorities, I am satisfied that this Court has no jurisdiction to vary the order made on 14 August 1989. It is a final order and there is nothing left for the Court to do. This Court could only take cognisance of a fresh action commenced by the defendant to set aside that part of the order of the Court directing the reserve prices to be fixed for the sale of the lands in question.

As the defendant had failed to institute a fresh action I had no choice but to dismiss its application made by way of summons-in-chambers with costs.

Also found at [1991] 1 CLJ 769